THE POWER OF CONGRESS TO REGULATE RAILWAY RATES.

THE power of Congress to regulate railway rates is based upon that section of the Constitution which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."[1] This grant of power, however, is limited by the provision that "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another."[2] It is also limited by the Fifth Amendment, which provides that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." Furthermore, it is subject to certain well-settled constitutional principles underlying our form of government, namely: (1) Congress cannot delegate its legislative powers; (2) Congress cannot confer judicial powers, except upon courts established in the manner provided in the Constitution; and (3) Congress cannot confer non-judicial powers upon a duly established court.

In framing any congressional legislation vesting in a commission power to fix or control the charges of railway companies in respect of interstate commerce, it is essential to take into consideration the following propositions:

1. Unreasonably high rates are illegal. A public carrier is prohibited by the common law from making any unreasonably high charge, and this common law prohibition has been reinforced by the Interstate Commerce Act as to all interstate rates of railway companies.[3] Congress has also strictly prohibited interstate carriers from making any unjust discrimination of any kind. These statutory prohibitions undoubtedly are constitutional and valid.

2. The states have power to regulate domestic rates. It is settled by the decisions of the Supreme Court of the United

[1] Art. I. § 8. [2] Art. I. § 9.
[3] Maximum Rate Case, 167 U. S. 479, 501.

States that the legislature of a state can regulate the charges of railway companies for the transportation of passengers and freight wholly within the state.[1] However, inasmuch as the power to regulate interstate commerce is vested by the United States Constitution in Congress, a state cannot regulate the charges in respect of interstate commerce.[2]

The power of a state to regulate the charges of railway companies in respect of transportation wholly within the state is subject to the Fourteenth Amendment of the United States Constitution. Accordingly, a state statute, or a regulation made under authority of a state statute, limiting or fixing the rates of a railway company within the state in such manner as to deprive the company of reasonable compensation, would be in violation of the Constitution.[3]

3. Congress has power to regulate interstate rates. The power of Congress to regulate the charges of railway companies in respect of interstate transportation is not necessarily coextensive with the power of the states to regulate charges in respect of domestic transportation. The power of Congress is based wholly upon the affirmative grant by the Constitution of power to regulate interstate commerce. The several states not only have the power to regulate domestic commerce, but they possess all other legislative powers that are not taken away by the Constitution of the United States. Congress cannot base its power to regulate charges of railway companies in respect of interstate transportation solely upon the principle established by the decision in Munn *v.* Illinois. An act of Congress regulating rates of a railway company cannot be sustained unless it is a regulation of interstate commerce within the meaning of the Constitution; nor can it be sustained if it gives a preference to the ports of one state over those of another, or if it deprives the railway company of liberty, or property, without due process of law.

While, no doubt, Congress can prohibit railway companies from charging more than reasonable compensation for the services rendered by them in interstate transportation, it has not unlimited power to interfere with them in their interstate transportation, or

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[1] Munn *v.* Illinois, 94 U. S. 113; Chicago, etc., Ry. Co. *v.* Iowa, 94 U. S. 155, and subsequent cases.

[2] Hanley *v.* Kansas City S. Ry. Co., 187 U. S. 617.

[3] Smyth *v.* Ames, 169 U. S. 466.

to exercise unlimited control over interstate railway companies in the use of their property, or in the transaction of their business. It is well settled that the Fifth Amendment and the Fourteenth Amendment not only prevent Congress and the several states from actually confiscating property or destroying its value, but also protect the liberty of contract and the liberty of the owner of property in its use and enjoyment.[1]

4. Neither Congress, nor a commission created by Congress, can fix the rates of a railway company solely on the basis of the value or of the cost of its property — rates can be fixed only on the basis of allowing the carrier to charge in each case reasonable compensation for the services rendered.

The property of a railway company is, practically, of no value except for railway purposes, and its *value* depends wholly upon its earning capacity when used for such purposes. This earning capacity, in turn, depends wholly upon the rates which the company can charge, the volume of its business, and the expenses of doing that business. It would, therefore, be illogical to attempt to fix the rates of a railway company on the basis of the *value* of its property. The value of the property is fixed by the rates and not the reverse. In Smyth *v.* Ames[2] the Supreme Court said that "the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public"; but it is obvious from the context that the word "value" was not here used in its usual sense.

At common law the reasonableness or unreasonableness of a rate charged by a railway company does not depend upon the original *cost* of the property used by it, nor upon the *cost* of reproducing a similar property. There is no rule of law limiting the income of a carrier according to the cost of its property. The question in each instance is whether the rate charged by the carrier requires the payment of more than reasonable compensation for the service rendered.[3] A carrier cannot charge more than reasonable compensation for the service rendered, merely

[1] Lake Shore, etc., Ry. Co. *v.* Smith, 173 U. S. 684, 691, 697; Allgeyer *v.* Louisiana, 165 U. S. 578; Lochner *v.* New York, U. S. Supreme Court, October Term, 1904.

[2] 169 U. S. p. 546.

[3] Cotting *v.* Stock Yards Co., 183 U. S. 79, 95, 97; Canada Southern Ry. Co. *v.* International Bridge Co., 8 App. Cas. 723, 731.

because it cannot otherwise earn a reasonable return upon the cost of its entire property; nor can a carrier be compelled to charge less than reasonable compensation merely because it may earn a large return upon the cost of its property. In determining what constitutes reasonable compensation for the service rendered in any given case, the aggregate profits of the carrier undoubtedly have a bearing and may be considered; but there are also many other elements that must be taken into account.

There are several reasons why the rates of a railway company cannot be fixed by Congress, or by a commission created by Congress, on the basis of the cost of the property of the company, or upon the basis of its income.

(*a*) It is an axiom of railroad rate-making that rates between the same points must be alike on all competing lines, because if they are not alike, the business will go to that line which makes the lowest rate. Therefore, in case two competing lines would not be equally prosperous if both should charge the same rates, it would be impossible to fix their rates in such manner as to yield to each the same relative net return upon the cost of the property. If the rates charged by the more prosperous company upon competitive business should be reduced so as to cut down its net income, the less prosperous company would be compelled either to reduce its rates equally or to lose all the competitive business, and in either event might be ruined.

(*b*) It would be impossible to fix the rates of a railway company on the basis of the net income upon its entire property so long as the regulation of rates for transportation wholly within a state remains subject to state control and not to the control of Congress. The Interstate Commerce Commission could deal only with rates upon interstate traffic and the states could deal only with rates upon traffic wholly confined within their boundaries. The Supreme Court of the United States has decided that when a state undertakes to prescribe rates of a carrier in respect of domestic business, it must do so with reference, exclusively, to what is just and reasonable as between the carrier and the public in respect of domestic business. For the same reasons, if the Interstate Commerce Commission should prescribe rates upon interstate business, it could consider only what would be just and reasonable in respect of interstate business. There is, therefore, no power competent to adjust and prescribe a complete schedule of rates on the basis of allowing a railway company to earn only what may be deemed a

reasonable net return on the original cost, or the cost of reproduction, of its property.[1]

Moreover, even if Congress had constitutional power to withdraw from the several states all control over the railways engaged in interstate commerce and to regulate their local as well as their interstate rates, it is not probable that it would resort to so revolutionary a measure.

(*c*) While the original cost, or the cost of reproduction, of the property of a railway company, and the rates required to enable the company to earn a fair return upon this cost, are elements to be considered in determining whether a statute fixing maximum rates is unconstitutional because confiscatory, these are not the only elements.[2] The owner of property devoted to a public service cannot be deprived by law of the fruits of his skill, industry, and thrift; nor can he be deprived of an increment in value of his property due to the development of the country or to good fortune. The power to regulate charges in a business of a public character is not based on the ground that the legislature can prevent the owner of property used in this business from earning more than a specified profit upon the cost of this property. It is based on the ground that the legislature can prevent any individual or corporation engaged in a business of a public character from charging more than reasonable compensation for the services rendered.

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[1] In Smyth *v.* Ames, 169 U. S. 466, 541, the Supreme Court of the United States said: "In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

[2] Smyth *v.* Ames, 169 U. S. 546, 547.

Neither a state nor the United States would have constitutional power to seize the net income of a railway company over and above such sum as the legislature or the courts may deem to be a reasonable return upon the cost of its property. The legislature could not require any such excess to be paid into the state treasury, nor could the legislature give this excess to shippers upon the railway.

It is to be observed in this connection that the railway companies have not received their franchises from the United States and that the United States has not conferred upon them the power of eminent domain. Although a state may base a power to regulate railway companies on the ground that they have assumed the performance of a function of the state by accepting the franchises and the power of eminent domain granted by it, the United States cannot base the power of regulation upon that ground. Accordingly, the rule laid down by Mr. Justice Brewer in Cotting *v.* Kansas City Stock Yards Co.[1] with reference to the power of a state legislature to regulate the charges of a stockyards company should be applied. It should be held that Congress, or a commission created by Congress, can declare, subject to review by the courts, what rates in respect of interstate transportation will pay a railway company reasonable compensation for its services; but that a railway company cannot, in any case, be deprived of the right to make such charge as is reasonable, having regard to the value of the service, and that it cannot be compelled to reduce its charges merely because the volume of its business enables it to earn large profits on its capital.

5. Railway rates, like the charges in any other business, are determined largely by considerations of business policy and cannot be fixed by the application of definite principles or hard and fast rules. Those who manage the traffic of a railway company must exercise a wide discretion in adjusting its tariffs from time to time to meet the ever changing requirements of trade and of business conditions. Many elements must be considered, besides the cost of transportation, such as competition by land and water, the volume and character of the business, the length of the haul, the rates that can be paid in competition with producers of similar articles at other places, the existence of return loads, etc. In many cases railway companies voluntarily fix their rates far below the

[1] 183 U. S. 79, 97.

maximum that would be reasonable and lawful, as when it is desirable to develop a new territory, or to encourage the establishment of a new industry, or otherwise to help build up some new source of traffic. In many cases they are forced, by reason of competition, either to make rates that would be ruinous if applied to all their traffic or to give up the competitive business entirely. Again, in other cases, they must accept minimum rates by reason of the long haul required to carry a product to market. It is rarely, if ever, true that there is but one just and reasonable rate for the transportation of a given article between two points. In nearly every instance there is a wide range within which any rate would be just and reasonable, and it is wholly a question of business policy at what point the rate shall be fixed within that range.

It would be utterly impracticable for a legislature, or a commission, to exercise intelligently the wide business discretion necessary to adjust railway rates to meet the varying conditions of trade. It would seem also that an act of Congress taking away from a railway company its business discretion in the adjustment of its rates would be unconstitutional, because depriving the company of its liberty and property without due process of law. However, the decisions of the Supreme Court indicate that the legislature of a state, or a commission created by a state legislature, can, to some extent, substitute its own business judgment for that of the railway companies in fixing their rates. In Minneapolis, etc., R. R. Co. *v.* Minnesota,[1] the Supreme Court said: "We do not think it beyond the power of the State Commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular." Moreover, it has often been held that the courts will not interfere with a regulation of rates by the legislature, or by a commission, unless it appears that the rates prescribed are clearly so unreasonable as to make their enforcement equivalent to confiscation of property.[2] There is, therefore, a wide range between a rate so high that the courts will declare it to be unreasonable and illegal if imposed by a railway company, and a rate so low that the courts will declare it to be confiscatory if imposed by the legislature or by a commission.

This point has not always been borne in mind by the courts, and

[1] 186 U. S. 257, 267.

[2] San Diego Land Co. *v.* National City, 174 U. S. 754.

has very generally been overlooked in drafting the various bills introduced during the last session of Congress. The expressions "reasonable rates" and "unreasonable rates" are often used in very different senses. Thus, when it is said that a rate shall be reasonable, this may mean (1) that the rate shall not be unreasonably high and illegal under the common law and the Interstate Commerce Act, or (2) that the rate shall not be so low that a court would decide it to be confiscatory, or (3) that the rate shall be that particular rate which, in the discretion of a commission, or of some particular person, ought to be established between these two extremes. When it is said that a rate is unreasonable, this may mean (1) that it is unreasonably high and therefore illegal, or (2) that it is unreasonably low, or (3) that it is different from the rate which, in the opinion of a commission, or of some particular person, ought to be established between these two extremes.

6. To fix the rates to be charged by a carrier in the future is a legislative and not a judicial act. This has repeatedly been pointed out by the Supreme Court of the United States. In the Maximum Rate Case,[1] the Supreme Court used the following language:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future — that is a legislative act. . . .

"The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance."

7. Congress cannot confer judicial powers upon the Interstate Commerce Commission. It can confer judicial powers only upon courts established in the manner prescribed by the Constitution. The judges of such courts must be appointed to hold office during good behavior, and must receive for their services a compensation which shall not be diminished during their continuance in office. As will be pointed out hereafter, a judge can be required to perform only strictly judicial services.[2] The Interstate Commerce

[1] 167 U. S. 479, 499, 505. See also Texas & Pac. Ry. Co. *v.* Interstate Com. Com. 162 U. S. 197, 234.

[2] See point 9, *infra.*

Commission is vested with various non-judicial functions, such as the duties of procuring statistics and of prosecuting violations of the law. Congress could not confer strictly judicial powers upon a commission so constituted, nor could it give to such a commission power to adjudicate finally the lawfulness of a rate charged by the railway companies, or to impose fines or penalties.[1]

8. Congress can confer upon a commission power to fix, subject to review by the courts, the maximum rates that would not be unreasonably high and extortionate as against shippers, but it is doubtful whether or not Congress can vest in a commission the purely discretionary power to fix rates as it sees fit. The Constitution provides that "*all* legislative powers herein granted shall be vested in a Congress of the United States," and the general rule is well settled that Congress cannot delegate its legislative powers to any other body.[2] It has never been decided that Congress can delegate to a commission the power of prescribing future railway rates, because Congress has never passed any law purporting to do so. In a number of the states, however, such laws, delegating to railway commissioners the power of fixing rates, have been passed, and their constitutionality has been sustained.[3] These decisions are based upon the doctrine that while a legislature may not delegate its strictly legislative powers, yet it may delegate authority to regulate certain matters which in the nature of things require regulation of a quasi-administrative character and which, in the nature of things, could not be satisfactorily regulated by the legislature itself.[4] According to these cases, while the power of fixing rates is a function of the legislature, it is a quasi-administrative function which may be delegated to a commission. In upholding

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[1] Interstate Com. Com. *v.* Brimson, 154 U. S. 447, 485.

[2] Art. I. § 1. Cooley, Constitutional Limitations, 7th ed., 163. "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

[3] Georgia R. R. Co. *v.* Smith, 70 Ga. 694; Tilley *v.* Railway Co., 4 Woods (C. C.) 427; McWhirter *v.* Pensacola Ry. Co., 24 Fla. 417, 471; Express Co. *v.* R. R. Co., 111 N. C. 463, 472; Chicago, etc., Ry. Co. *v.* Dey, 35 Fed. Rep. 866.

[4] See Field *v.* Clark, 143 U. S. 649, 692; Buttfield *v.* Stranahan, 192 U. S. 470.

the Railroad Commission Law of Georgia, Circuit Judge Woods used the following language:

"The true distinction therefore is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made."[1]

No doubt, Congress can by law prescribe general rules for the regulation of the charges of railway companies — for example, it can (as it did in the Interstate Commerce Act) prohibit railway companies from charging unreasonably high or extortionate rates and can prohibit them from unduly discriminating in their charges; and it can establish a commission or other administrative body with power to carry into effect such general rules, including power to make orders fixing *prima facie* what rates shall be deemed unreasonably high or discriminatory and therefore illegal under the statute. Under such a law, the function of a commission would be merely administrative in carrying out the declared will of Congress to prohibit excessive or unjustly discriminatory rates, and the commission itself would not be vested with the legislative power of determining, according to its own arbitrary will or ideas of policy, what rates shall be charged in the future. Under such a law the action of the commission, although *prima facie* valid, could be reviewed and set aside by the courts, and the carrier could not be deprived of the right to charge any rate that would not be unreasonably high or unjustly discriminatory. Even if Congress itself has constitutional power to fix the rates of the railway companies according to its discretion, it would be going a step further to hold that it can delegate this discretionary power to a commission. As was pointed out by the Supreme Court, such a power is "a legislative power . . . of supreme delicacy and importance"[2] and would enable the Commission to make "laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy."[3]

9. Congress cannot vest in the courts power to fix future rates, or to consider and pass upon the wisdom or policy of the commission in prescribing a particular rate which is neither con-

[1] 4 Woods (U. S.) 427, 446.
[2] 167 U. S. 505.
[3] 162 U. S. 234.

fiscatory nor unreasonably high. It is well settled that Congress cannot constitutionally require the courts to perform any duties that are not of a judicial character. It cannot require the courts, directly or indirectly, to perform duties of an administrative or of a quasi-legislative character.[1] It follows, therefore, that Congress has no constitutional power to require the courts to exercise the legislative or quasi-legislative power of a commission in fixing the rates to be charged by a railway company.[2] Congress has never attempted this, and the precise point, therefore, has not been decided; but a similar question has arisen under state legislation purporting to vest the rate-making power in the courts, and this legislation has been condemned as unconstitutional. In State *v.* Johnson,[3] the Supreme Court of Kansas decided that the act of the legislature of that state creating a court called the "Court of Visitation" was unconstitutional for the reason that it conferred upon this court the power of prescribing the future rates of railway companies — that being a legislative and not a judicial function. The same conclusion was reached when the validity of this Kansas law was considered by the Circuit Court of the United States.[4]

If Congress cannot give to the courts original power to prescribe what rates the railway carriers shall charge, it cannot require them to reconsider the whole case as it was considered by the commission and to pass upon the wisdom and policy of the action of the commission in fixing a rate. In other words, Congress cannot constitute the courts, in substance, an Appellate Railroad Commission, and require them to substitute their own ideas as to the wisdom and policy of a rate for the ideas of the commission. Any statute authorizing the commission in the first instance to exercise purely discretionary power in fixing rates, and requiring the courts, upon reviewing this action, to exercise the same discretion as the commission, would be unconstitutional, because this discretion would be of a legislative and not of a judicial character. Such a statute would in effect constitute the courts the ultimate

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[1] Opinions of the Judges of the Supreme Court in the notes to Hayburn's Case, 2 Dall. (U. S.) 409; United States *v.* Todd, 13 How. (U. S.) 52; Gordon *v.* United States, 2 Wall. (U. S.) 561; *Re* Sanborn, 148 U. S. 222; Interstate Com. Com. *v.* Brimsen, 154 U. S. 447, 484; Norwalk Street Railway Company's Appeal, 69 Conn. 597.

[2] See points 5 and 6 above.

[3] 61 Kan. 803.

[4] Western Union Tel. Co. *v.* Myatt, 98 Fed. Rep. 335. See also, Nebraska Telegraph Co. *v.* State, 55 Neb. 627, 636.

rate-makers for the railways in the United States. The courts undoubtedly can pass upon the question whether a rate is unreasonably high and therefore unlawful, or whether it is in violation of a legal order made by the commission. They can also pass upon the question whether the action of the commission in fixing a rate is constitutional, that is to say, whether it would in effect amount to confiscation of the property of the carrier; but they cannot be required to substitute their own ideas of wisdom or policy for those of the commission in fixing a rate which is neither confiscatory nor unreasonably high. The question in such a case would be neither a question of fact nor a question of law. The adjustment of the rates of a carrier between these extremes presents merely a question of business policy largely dependent upon individual opinion and preference. The carrier can pass upon this question; and possibly Congress, in the exercise of its legislative functions, can pass upon it. Possibly, also, Congress can empower a commission to do so. But the courts cannot be required to decide such questions and in effect to take charge of the traffic management of the railways.[1] This precise point was decided in the case of Steenerson *v.* Great Northern Ry. Co.[2] The act of Minnesota giving to the Railroad and Warehouse Commission of that state power to fix rates made provision for an appeal to the District Court, and contained the following provision: "Upon such appeal, and upon the hearing of any application . . . for the enforcement of any such order made by the commission, the district

[1] The following remarks of Mr. Justice Brewer in the case of Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 397, are instructive in this connection: "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or by a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

[2] 69 Minn. 353, 575; 72 N. W. Rep. 713. See also *In re* Janvrin, 174 Mass. 514.

court shall have jurisdiction to, and it shall, examine the whole matter in controversy, including matters of fact as well as questions of law, and to affirm, modify or reverse such order in whole or in part as justice may require; and in case of any order being modified, as aforesaid, such modified order shall, for all the purposes contemplated by this act, stand in place of the original order so modified and have the same force and effect throughout the State as the orders of said commission."

The Supreme Court of Minnesota held that

"If by this the legislature intended to provide that the Court should put itself in the place of the commission, try the matter *de novo*, and determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional. The fixing of rates is a legislative or administrative act, not a judicial one. And the performance of such duties cannot under our constitution be imposed on the judiciary."

No constitutional statute can be drawn that will give to the courts power to hear the question *de novo*, as in case of an appeal of a cause in equity, and to reconsider the wisdom and policy of the commission in fixing any particular rate between the two extremes of legality referred to above. No statute would be necessary to give the railway companies power to resort to the courts in order to restrain confiscatory action of the commission, and no additional protection through the courts can be conferred by Congress. It follows, therefore, that a grant of power to a commission to fix rates, in its discretion, would vest in it practically autocratic power, subject to no control by the executive or by the courts, to dictate the policy of the railways of the United States, and autocratic power to make or unmake the prosperity of different sections of the country so far as this would depend upon the rates of transportation. It would place in the practical control of the commission property of a value of about $12,000,000,000 — the most important single property interest in the United States. It would create a form of bureaucratic government more absolute than any existing in any other country in the world. It would certainly be contrary to the American system of government and to American ideas of liberty.

The action of the commission in such a case would be subject only to the right of the carriers to resort to the courts to prevent confiscatory action. Provisions for a further judicial review would

be illusory. Under the bills that have been introduced in Congress, the only question that could be considered upon an appeal by a railway company would be whether the rate prescribed by the commission was confiscatory, and the only question that could be considered upon an appeal by a shipper would be whether the rate prescribed was extortionate or discriminatory. If a locality should be aggrieved by the action of the commission, probably it would not have any redress whatsoever.

10. A grant of discretionary power to fix railway rates within the limits of legality, as heretofore defined, would necessarily include power, through an adjustment of rates, to affect the relative rates of different localities and to aid one locality in the country at the expense of other localities by establishing a differential. In some of the bills introduced at the last session of Congress it is provided in express terms that the commission shall have power to prescribe "the just relation of rates to or from common points"; but irrespective of such provisions, the power to do this would necessarily result from any grant of a purely discretionary power of fixing rates.

The Constitution of the United States provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." In construing this constitutional prohibition it is to be observed, first, that it applies only to regulations of commerce by Congress and not to state legislation giving preferences to certain ports;[1] secondly, that it does not prohibit individuals or railway companies from voluntarily giving differentials or preferences to certain ports; and thirdly, that it applies to *all* regulations of commerce established by Congress, or by a commission created by Congress. An order of a commission fixing rates can be sustained only on the theory that it is a regulation of commerce by the legislature, acting through the commission, and, as has often been decided, such an order is subject to the same constitutional limitations as a regulation enacted by the legislature in the first instance. In the case of Pennsylvania *v.* Wheeling Bridge Co.[2] it was claimed that an act of Congress authorizing the construction of a bridge across the Ohio river at Wheeling, Virginia, was in violation of this constitutional prohibition, because the construction of this bridge would cause delay and expense in the operation of steamboats upon the Ohio river

[1] Munn *v.* Illinois, 94 U. S. 113, 135.

[2] 18 How. (U. S.) 421.

bound to or from the port of Pittsburg, and would virtually give a preference to the port of Wheeling. A majority of the court, however, held that the act of Congress was a legitimate exercise of the power to regulate commerce, although it might give an advantage to the ports of one state which would incidentally operate to the prejudice of the ports of a neighboring state, and that the constitutional prohibition prevented Congress only from giving a *direct* preference to the ports of one state over those of another. Mr. Justice Nelson also expressed the view that what was forbidden was not discrimination between the ports of different states, but discrimination between states, and that in order to bring the case within the prohibition it was necessary to show not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania. This latter view, however, is not tenable, as is shown by the discussion of the constitutional prohibition in Knowlton *v.* Moore.[1]

It seems clear that an act of Congress regulating interstate commerce is not in violation of this prohibition merely because the regulation would incidentally, and not directly, give some advantage to the ports of one state over those of another state. The constitutional prohibition would forbid only a regulation of commerce directly and necessarily giving such a preference. The question, therefore, arises: Can a direct preference be given to the ports of one state over those of another through an adjustment of railway rates in the United States? Of course, the fact that railways were not known at the time of the adoption of the Constitution has no bearing upon the question. If a law prescribing the rates of railway companies is a regulation of commerce under section 8 of Article I., it must also be a regulation of commerce under section 9 of the same article.

It is obvious that an act of Congress, or an order of a commission, merely fixing the *maximum* rates that may be charged by railway companies in respect of shipments to or through certain ports, would not give a preference to the ports of one state over those of another, because the railway companies leading to each port could compete freely with those leading to other ports by reducing their rates. The establishment of a differential in favor of the railways leading to a certain port implies that the railways leading to other ports shall be prohibited from reducing their rates

[1] 178 U. S. 41, 104 *et seq.*

below a prescribed minimum, and that free competition among them shall thus be stopped. While, possibly, it may be held that the establishment of such a differential in respect of shipments between interior points and the cities situated at different ports would not necessarily give a direct preference to any port, because such shipments may not go through the ports, it seems clear that a preference would be given by a differential in respect of through shipments to or from foreign points. As the through rates in respect of shipments between the same points must necessarily be substantially alike by all routes, the obvious purpose of the differential would be to give to the steamship lines from certain ports a larger share of the through rate than the steamship lines from other ports. It is difficult to see how the courts could avoid recognizing the fact that the direct and necessary result would be to give a preference by statute to certain ports at the expense of others. It is no answer to say that a regulation of Congress, or of a commission, merely establishing "the just relation of rates" upon shipments by different ports, would not grant a preference to the ports of any state. Stated baldly, this would mean that Congress, or a commission, can take away from a particular port its natural advantages by granting a law-made advantage to other ports by means of a preferential regulation of commerce. The Constitution provides that no preference shall be given by *any* regulation of commerce to the ports of one state over those of another. To hold that Congress or a commission can by law give to the various ports such preferences as in the judgment of Congress, or a commission, will equalize their natural advantages would wholly destroy the value of the constitutional prohibition.

The constitutional prohibition was designed to prevent sectional legislation that might array one part of the country against another. The Interstate Commerce Act itself recognizes that the Commission is subject to politics, as the Act provides that not more than three of the commissioners shall belong to the same political party. One or the other of the great political parties will always control the Commission. If power to fix the relative rates of transportation to and from different ports or sections of the country is conferred upon it, the adjustment of railway rates in the United States will inevitably become a political question.

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